

No. 78833-2

SUPREME COURT
OF THE STATE OF WASHINGTON

JAY COLBERT, as Personal Representative of
the Estate of Denise Colbert; and for himself,

Petitioner,

v.

UNITED MARINE CORPORATION OF
TENNESSEE, a Tennessee corporation;
AMERICAN MARINE, a Tennessee corporation;
SKIER'S CHOICE CORPORATION OF TENNESSEE
an Oklahoma Corporation; and Marc Jacobi,

Respondents.

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. STATEMENT OF THE CASE.....	2
C. ISSUE PRESENTED FOR REVIEW	5
D. ARGUMENT	5
(1) <u>Skier's Choice Negligently Inflicted</u> <u>Physical Injury on Denise Colbert</u>	5
(2) <u>This Court Should Reaffirm the Elements</u> <u>of the Tort of Negligent Infliction of</u> <u>Emotional Distress</u>	7
(a) <u>Temporal/Physical Proximity to</u> <u>Injury-Causing Event to Family</u> <u>Members or Loved Ones</u>	8
(b) <u>Objective Symptoms of</u> <u>Emotional Distress</u>	16
E. CONCLUSION.....	18
Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Table of Cases</u>	
 <u>Washington Cases</u>	
<i>Corrigal v. Ball & Dodd Funeral Home, Inc.</i> , 89 Wn.2d 959, 577 P.2d 580 (1978).....	13, 14, 15, 19
<i>Cunningham v. Lockard</i> , 48 Wn. App. 38, 736 P.2d 305 (1987).....	10
<i>Gain v. Carroll Mill Co., Inc.</i> , 114 Wn.2d 254, 787 P.2d 553 (1990).....	<i>passim</i>
<i>Greene v. Young</i> , 113 Wn. App. 746, 54 P.3d 734 (2002)	11
<i>Haubry v. Snow</i> , 106 Wn. App. 666, 31 P.3d 1186 (2001)	16
<i>Hegel v. McMahon</i> , 136 Wn.2d 122, 960 P.2d 424 (1998).....	<i>passim</i>
<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 553 P.2d 1096 (1976)	<i>passim</i>
<i>Riehl v. Foodmakers, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	12
<i>Seeberger v. Burlington Northern R.R. Co.</i> , 138 Wn.2d 815, 982 P.2d 1149 (1999).....	11
<i>Trinh v. Allstate Ins. Co.</i> , 109 Wn. App. 927, 37 P.3d 1259, review denied, 147 Wn.2d 1003 (2002).....	16
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	5
 <u>Other Cases</u>	
<i>Beck v. State</i> , 837 P.2d 105 (Alaska 1992)	14
<i>Gabaldon v. Jay-Bi Prop. Mgmt., Inc.</i> , 122 N.M. 393, 925 P.2d 510 (1996).....	8, 12
<i>Landreth v. Reed</i> , 570 S.W.2d 486 (Tex. Civ. App. 1978).....	14
<i>Ruttley v. Lee</i> , 761 So.2d 777 (La. App.), writ denied, 768 So. 2d 1287 (La. 2000)	14
<i>Stump v. Ashland, Inc.</i> , 499 S.E.2d 41 (W. Va. 1997).....	14
<i>Tommy's Elbow Room, Inc. v. Kavorkian</i> , 727 P.2d 1038 (Alaska 1986).....	14

<i>Wilks v. Hom</i> , 3 Cal. Rptr. 2d 803 (Cal. App. 1992)	14
<i>Zuniga v. Housing Auth.</i> , 41 Cal. App. 4 th 82, 48 Cal. Rptr. 2d 353 (Cal. App. 1995).....	14

Federal Cases

<i>Air Crash Disaster Near Cerritos, California,</i> on August 31, 1986, 967 F.2d 1421 (9 th Cir. 1992)	14
<i>Bryant v. Country Life Ins. Co.</i> , 414 F. Supp.2d 981 (W.D. Wash. 2006).....	16
<i>Chester v. Mustang Mfg. Co., Inc.</i> , 998 F. Supp. 1039 (N.D. Iowa 1998).....	14

Statutes

Laws of 2006, ch. 140, § 5.....	7
---------------------------------	---

Other Authorities

Dale Joseph Gilsinger, <i>Recovery Under State Law for</i> <i>Negligent Infliction of Emotional Distress Under</i> <i>Rule of Dillon v. Legg</i> , 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or <i>Refinement Thereof</i> , 96 A.L.R. 5 th 107 (2002).....	12-13
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A. INTRODUCTION

This case involves the appropriate scope of so-called bystander liability in connection with the tort of negligent infliction of emotional distress. Apparently concerned that too many persons could recover for the tort, the Court of Appeals below severely circumscribed the class of persons who could recover by redefining the protected class for the tort and imposing new requirements for proof of the tort victim's emotional distress. The Court has the opportunity here to reaffirm the proper contours of the tort.

Jay Colbert experienced the most traumatic type of situation anyone can imagine – he was present at the scene of the drowning of his daughter, his only child, witnessing search and rescue efforts, and the removal of his daughter's lifeless body from a lake. He states a cause of action for negligent infliction of emotional distress against the defendants responsible for his daughter's death.

This Court should reaffirm the rule it announced in *Hegel v. McMahon*, 136 Wn.2d 122, 960 P.2d 424 (1998) and *Gain v. Carroll Mill Co., Inc.*, 114 Wn.2d 254, 787 P.2d 553 (1990) that “presence at the scene of the accident or arrival there shortly thereafter” is a question for the jury. The Court should further reject any attempts to add elements to the tort

such as a requirement that a plaintiff must witness the trauma to the victim or suffering by the victim.

The Court should also reaffirm its rule announced in *Hegel* and *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976) that a plaintiff's emotional distress can be proved by the testimony of health care professionals diagnosing the plaintiff's condition based on appropriate evidence substantiating the health care professional's diagnosis.

B. STATEMENT OF THE CASE

Jay and Kelly Colbert were awakened from a sound sleep by a telephone call at around 3 a.m. on August 3, 2003. CP 430, 443. Their daughter's boyfriend, Kyle Swanson, was on the line and he was quite upset. CP 443. Denise had disappeared from the back of a boat while swimming in Lake Tapps and was missing; the search for Denise was taking place at the lake. CP 444, 467.

The Colberts drove immediately to the lake, a five minute drive from their home. CP 467. When the Colberts arrived at the scene, multiple emergency responders were present. CP 431, 468. The Colberts arrived at Lake Tapps within minutes of Denise's appearance.¹

¹ The time sequence in the Court of Appeals opinion is inconsistent. At times, the Court focused on the fact Denise was pulled from the lake about three hours after the Colberts arrived there. The more relevant inquiry is the Colberts' arrival *at the accident scene*.

The Colberts watched the rescue operation from the dock of a friend, Ed Peterson, who lived on Lake Tapps not far from the scene of this activity. CP 432, 444.

At some point after dawn,² Colbert saw a buoy pop up to the surface of Lake Tapps. CP 433, 469. He could hear the dialogue going on between the rescue workers out on the lake and knew what the buoy meant – it was tied to Denise’s body. CP 433. Jay Colbert saw the search and rescue boats move around alongside the marker buoy. CP 433. Colbert saw Denise’s body pulled over the side of the boat by her arm. *Id.*; CP 469. Her body was removed from the lake at another person’s property down the inlet, about 100 yards from the Petersons’ dock. CP 433, 469. The lighting conditions at this time were sufficient to permit the Colberts to view this activity from the Petersons’ dock. CP 452. Colbert could also see the rescue workers moving Denise’s body, once it was on the boat. CP 433. Colbert saw an ambulance down by the water. *Id.* The police brought out a stretcher. *Id.* He saw them put a sheet over Denise’s body and take her away. *Id.* When asked at his deposition whether he was able to recognize the body as Denise, he answered that he could. CP 469.

² Colbert hoped Denise would be found alive because she was an outstanding athlete with remarkable stamina and endurance. CP 432. It was only when he saw the marker buoy pop up, followed by the sight of her body, that he began to accept the reality of her death.

Despite this contrary evidence in the record, the Court characterized Jay Colbert's inability to see his daughter's body as an "undisputed" fact. Op. at 7-8.³

Dr. S. Erving Severtson, a clinical psychologist, examined Colbert on October 22, 2004. CP 472, 487. At the time of his clinical examination, Dr. Severtson also administered the MMPI-2 test, a reliable, objective psychological assessment instrument, to Colbert, CP 472-73, 491, and interviewed Colbert. Colbert suffered from severe emotional distress, which was not contrived or artificial. CP 473. Colbert's MMPI-2 was valid and showed extreme anxiety and depression, manifested primarily in somatic signs and symptoms. *Id.* Dr. Severtson concluded Colbert's witnessing of the police and fire recovery efforts for his daughter on Lake Tapps in the early morning hours of August 3, 2003 formed a highly significant component of the overall emotional distress Colbert experienced from his daughter's death. *Id.* On the basis of reasonable psychological probability, Dr. Severtson opined Colbert's symptoms of clinical depression, anxiety and emotional distress were caused directly and/or markedly exacerbated by the death of his daughter

³ These facts belie the assertion in the Court of Appeals opinion that Denise's body was "quickly wrapped" in a blanket and that Colbert could not see "identifying detail" from his vantage point. Op. at 3 n.2; Op. at 17 n.11. Colbert could identify his daughter's body from his vantage point. CP 469. On summary judgment all facts and

and the traumatic witnessing of the search and recovery efforts which resulted in the locating of her dead body. CP 473, 488.

C. ISSUE PRESENTED FOR REVIEW

Where a father was physically present at the scene of his only daughter's drowning, witnessing search and rescue efforts and the removal of his daughter's body from a lake, and he was diagnosed as suffering from clinical depression by a clinical psychologist as a result, does the father state a cause of action for negligent infliction of emotional distress against the tortfeasors who caused his daughter's death?

D. ARGUMENT

(1) Skier's Choice Negligently Inflicted Physical Injury on Denise Colbert

To establish a cause of action for negligent infliction of emotional distress, a plaintiff must first establish the defendant was, in fact, negligent. The *Hegel* court indicated such a cause of action involves "emotional trauma resulting from one person's observation or discovery of another's negligently inflicted physical injury." 136 Wn.2d at 126.

In this case, Jay Colbert asserted a claim against Skier's Choice for its fault in causing Denise Colbert's death because of the design and manufacture of the ski boat in question and its failure to warn boat owners

inferences from those facts must be considered in a light most favorable to Colbert as the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

and users of the risk of exposure to carbon monoxide. CP 317-18. Colbert moved for partial summary judgment on liability recounting in detail how the conduct of Skier's Choice resulted in Denise's death. CP 23-35, 273-79. Carbon monoxide poisoning from boat use was a risk known in the medical community. CP 29, 191-93. Such poisoning was the subject of a NIOSH (National Institute for Occupational Safety and Health) report. CP 29, 195-217. The National Marine Manufacturers Association issued a bulletin on carbon monoxide poisoning. CP 281-82, 288-90. Similarly, the American Boat and Yacht Council issued an advisory on carbon monoxide poisoning. CP 282-83, 295-305, 308-10.

Carbon monoxide is well understood by automobile drivers to be a potential source of death or serious injury in an enclosed space such as a garage. Carbon monoxide is also unreasonably dangerous in the open air when a powerboat is in use. Denise Colbert received a lethal dose of this gas from the boat manufactured by Skier's Choice. CP 483. Skier's Choice knew carbon monoxide is a deadly substance, a "silent killer." CP 428.

In connection with its summary judgment motion, Skier's Choice did not deny its negligence as to Denise Colbert, CP 373-84, 535-41, and it must be assumed for purposes of the review of the summary judgment

order that Skier's Choice negligently inflicted physical injury on Denise Colbert.⁴

(2) This Court Should Reaffirm the Elements of the Tort of Negligent Infliction of Emotional Distress

The Court of Appeals here imposed new requirements for a claim of negligent infliction of emotional distress, beyond those established in *Hunsley*, *Gain*, and *Hegel*, relying on out-of-state authorities that permit such a claim only if a plaintiff actually witnesses the traumatic event. For example, the Court's opinion required a plaintiff to arrive before emergency personnel are on the accident scene, Op. at 14; the plaintiff must also arrive "unwittingly" at the accident scene, Op. at 19; the plaintiff must have a "close up" view of the loved one's injuries. Op. at 18 n.12. Finally, the Court concluded, without significant analysis, that Jay Colbert failed to offer sufficient evidence of his emotional distress. The Court did not discuss this Court's requirement in *Hegel* of "objective symptomatology" and instead relied on the conclusory statement that Jay Colbert's distress "is a life experience that all may expect to endure." Op.

⁴ The 2006 Legislature adopted legislation in Denise Colbert's honor recognizing the hazard presented by carbon monoxide poisoning from boats. Laws of 2006, ch. 140, § 5.

at 16 (quoting *Gabaldon v. Jay-Bi Prop. Mgmt., Inc.*, 122 N.M. 393, 925 P.2d 510, 514 (1996)).⁵

(a) Temporal/Physical Proximity to Injury-Causing Event to Family Members or Loved Ones

Hunsley, Gain, and Hegel establish the elements of the tort of negligent infliction of emotional distress. In *Hunsley*, this Court concluded the plaintiff, who suffered the terror of having an automobile crash into the living space of her home, had a cause of action for negligent infliction of emotional distress, despite the lack of actual physical impact to her body. This Court concluded the tort did not require any actual physical impact or physical invasion of the plaintiff's personal security. 87 Wn.2d at 435. The Court indicated foreseeability was the appropriate limitation on the scope of the tort; only those who are foreseeably endangered by the tortious conduct could recover. *Id.* at 435-36. The Court expressly declined to:

draw an absolute boundary around the class of persons whose peril may stimulate the mental distress. This usually will be a jury question bearing on the reasonable reaction to the event unless the Court can conclude as a matter of law that the reaction was unreasonable.

Id. at 436 (citations omitted).⁶

⁵ The death of a child hopefully is *not* what all of us may expect to endure.

This Court again addressed the tort of negligent infliction of emotional distress in *Gain*. There, a Washington State Trooper was killed in a fatal accident. The Trooper's father and brother watched a television news broadcast of the accident and were able to confirm their family member was the victim. The *Gain* court denied recovery, concluding mental suffering by a relative who is not present at the scene of the injury-causing event is unforeseeable as a matter of law. While recognizing a defendant has a duty to avoid the negligent infliction of emotional distress, the Court determined:

This duty does not extend to those plaintiffs who have a claim for mental distress caused by the negligent bodily injury of a family member, unless *they are physically present at the scene of the accident or arrive shortly thereafter*.

114 Wn.2d at 261 (emphasis added).

In its subsequent ruling in *Hegel*, this Court emphasized the importance of "shortly thereafter," rejecting a bright line rule confining recovery to those who witnessed the injury-causing event. The Court refused to ignore the "shortly thereafter" language in *Gain*, stating "[t]he emotional trauma caused by seeing a loved one injured at an accident scene stems not merely from witnessing the transition from health to

⁶ This Court also held that in order to recover the mental and emotional suffering of the plaintiff must be those of a "normally constituted person" and must be manifested by objective symptomatology. *Id.* at 435-36.

injury, but also from witnessing the aftermath of an accident in all its alarming detail.” *Hegel*, 136 Wn.2d at 130-31. This Court rejected *Cunningham v. Lockard*, 48 Wn. App. 38, 736 P.2d 305 (1987), on which the Court of Appeals relied in its opinion. Op. at 9.⁷

This Court articulated its rule regarding “shortly thereafter” as one recognizing “a cause of action where a plaintiff witnesses the victim’s injuries at the scene of an accident shortly after it occurs and before there is material change in the attendant circumstances.” *Id.* at 132. In other words, the plaintiff must arrive at the scene “before the horror of the accident has abated.” *Id.* “The critical factors are the circumstances under which the observation is made, and not any rigid adherence to the length of time that has passed since the accident.” *Id.* The length of time elapsing since the accident is clearly a fact for the trier of fact to consider.⁸

⁷ The *Cunningham* court limited negligent infliction of emotional distress claims to a plaintiff who was present at the time the victim was imperiled by the defendant’s negligence. In *Gain*, this Court rejected *Cunningham*’s limitation and concluded a plaintiff must either be physically present at the scene of the accident or arrive shortly thereafter in order to recover. *Gain*, 114 Wn.2d at 261. In *Hegel*, this Court reaffirmed its conclusion in *Gain*. *Cunningham* should be expressly overruled.

⁸ The Court of Appeals states Colbert was not a foreseeable plaintiff. Op. at 9-10. The Court of Appeals erroneously states foreseeability is a question of law after *Hegel*, Op. at 9 n.7. The Court of Appeals correctly acknowledges *Hunsley* indicated foreseeability is a *question of fact*, but then somehow suggests *Cunningham*, a Court of Appeals decision, “overruled” *Hunsley* on that issue. In *Gain* and *Hegel*, this Court further refined the limitations on the cause of action, but *nowhere* in *Gain* or *Hegel* did this Court announce a new rule treating foreseeability as a question of law. *Gain*, 114 Wn.2d at 255; *Hegel*, 136 Wn.2d at 130, 132. Once a duty is found to exist,

Similarly, the “horror of the accident” is for the trier of fact.⁹ For example, juries can decide a drowning is just as horrible as an automobile accident.

The Court of Appeals offered no explanation for its determination that the cause of action for negligent infliction of emotional distress is unavailable if emergency personnel beat the plaintiff to the accident scene. Op. at 14. Such a requirement is not present in *Hunsley*, *Gain*, or *Hegel*, and makes little sense. The tort should not be dependent on a race to the accident scene.

Equally puzzling is the Court of Appeals determination that a plaintiff must arrive “unwittingly” at the scene. Op. at 19. Again, this Court has never adopted such a requirement. The Court of Appeals analysis makes little sense, barring, for example, a cause of action for any

foreseeability limits the scope of the duty owed. Foreseeability is a question of fact. *Seeberger v. Burlington Northern R.R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999).

⁹ In *Greene v. Young*, 113 Wn. App. 746, 54 P.3d 734 (2002), the plaintiff arrived at the aftermath of a carjacking in which his pregnant wife suffered two fractured ankles when she and her son fell out of the moving car and the carjacker ran over her legs. He observed fire trucks, ambulances, and police cars at the scene, and witnessed his wife lying on a stretcher with both of her legs in splints, and exhibiting extreme emotional distress. His son was screaming uncontrollably. *Id.*, 113 Wn. App. at 749. The court held Greene had insurance coverage for his post-traumatic stress disorder arising out of the carjacking and his observation of his wife and child at the aftermath because the emotional trauma caused by seeing a loved one injured at an accident scene stems not merely from witnessing the transition from health to injury, but also from witnessing *the aftermath of an accident*. *Id.* at 752. The Court of Appeals did not discuss *Greene* in its opinion.

plaintiff contacted by law enforcement or another family member about an accident.

Finally, the Court of Appeals implies that a plaintiff must actually witness trauma to the victim or the victim's suffering, relying on *Gabaldon v. Jay-Bi Property Management, Inc.*, 122 N.M. 393, 925 P.2d 510 (1996). Op. at 13-14. But New Mexico requires a plaintiff to actually witness *the accident itself* before a cause of action for negligent infliction of emotional distress is stated. The New Mexico court limited recovery to a plaintiff who had a "contemporaneous sensory perception of the accident." 925 P.2d at 394. The *Gabaldon* court's analysis of the tort has never been the law in Washington since *Hunsley*.

There is no reason for this Court to depart from its consistent line of cases. *Riehl v. Foodmakers, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (stare decisis dictates prior rule should not be abandoned unless it is incorrect and harmful).

In this case to date, both parties have provided authorities from other states in support of their respective positions. It is entirely predictable that respondents will do so again in their supplemental brief. Quite frankly, there are many cases from all over the United States on all sides of the issues in this case. *See generally*, Dale Joseph Gilsinger, *Recovery Under State Law for Negligent Infliction of Emotional Distress*

Under Rule of Dillon v. Legg, 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968), or *Refinements Thereof*, 96 A.L.R. 5th 107 (2002). The more pressing issue for this Court is the proper assessment of the elements of the tort of negligent infliction of emotional distress, as understood in *Washington law*.

In Washington law, contrary to the Court of Appeals analysis below, there is no requirement that a plaintiff witness a loved one's suffering or physical trauma, such as a crushed body or bleeding, to recovery for negligent infliction of emotional distress. In *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 577 P.2d 580 (1980), this Court held that a plaintiff could recover for negligent infliction of emotional distress where the funeral home mishandled the plaintiff's son's remains. The plaintiff was not physically present when the funeral home failed to place her son's ashes in an urn. She experienced the aftermath of the funeral home's wrong – she sifted through what she thought was packing material in a sealed cardboard box looking for the urn, and learned the “packing material” was her son's ashes. *Id.* at 960. To adopt the Court of Appeals analysis of the tort would require this Court to overrule *Corrigal*.

There is little question but that a relative witnessing suffering by or physical trauma to a loved one caused by another's wrongful conduct has

a cause of action for negligent infliction of emotional distress, but failing to observe the trauma or the suffering of the loved one does not preclude recovery under *Hunsley*, *Corrigal*, *Gain*, and *Hegel*. Nor should it.

A person witnessing the immediate aftermath of a loved one's drowning,¹⁰ injury or death in a vehicle,¹¹ or injury or death in a burning building¹² should recover. The Court of Appeals approach would

¹⁰ *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978) (sister of infant who drowned in daycare pool stated cause of action).

¹¹ *Ruttley v. Lee*, 761 So.2d 777 (La. App.), writ denied, 768 So. 2d 1287 (La. 2000) (mother arrived at traffic accident scene before daughter's body was removed from a car; she never saw daughter's body as car was covered with a canvas and police did not allow mother to go to the car); *Chester v. Mustang Mfg. Co., Inc.*, 998 F. Supp. 1039 (N.D. Iowa 1998) (plaintiff was not present when the bucket on a skid-loader dropped and pinned her husband between the bucket and the skid-loader's frame; a claim of negligent infliction of emotional distress was stated because the plaintiff arrived at the scene while the treatment of her husband was ongoing); *Beck v. State*, 837 P.2d 105 (Alaska 1992) (plaintiff was miles from car accident scene where daughter died and learned of accident from friends; she arrived at site and was not allowed to approach her daughter's wrecked car); *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986) (father went to accident scene and witnessed daughter's body being removed by paramedics from automobile).

¹² *Stump v. Ashland, Inc.*, 499 S.E.2d 41 (W. Va. 1997) (plaintiffs who arrived after collision, impact, and subsequent explosion of tanker truck when it crashed into a home, killing two family members stated claim for negligent infliction of emotional distress; the injury-producing event was the fire which occurred over a prolonged period; plaintiffs witnessed the fire); *Zuniga v. Housing Auth.*, 41 Cal. App. 4th 82, 48 Cal. Rptr. 2d 353 (Cal. App. 1995) (plaintiff arrived at fire scene after fire department personnel, watching them attempt to rescue fire victims; his wife, three children, and grand mother-in-law died in the fire, but he saw body of one daughter carried out of building); *Wilks v. Hom*, 3 Cal. Rptr. 2d 803 (Cal. App. 1992) (mother of children, who was contemporaneously aware that an explosion caused injuries to her children, although she did not actually see or hear them being injured, was entitled to recover for the defendant's negligent infliction of emotional distress); *Air Crash Disaster Near Cerritos, California, on August 31, 1986*, 967 F.2d 1421 (9th Cir. 1992) (plaintiff's husband and two children perished when an airplane crashed into her home engulfing it in flames; plaintiff did not witness the plane crash into her home; she returned several minutes after the crash and was present at the scene of the fire and was aware that the fire was injuring her family; plaintiff could recover for negligent infliction of emotional distress).

essentially foreclose a cause of action if the loved one died immediately and did not “suffer” visibly to the family member approaching the accident scene. Similarly, the Court of Appeals analysis would have prevented the spouse or child of a firefighter or police officer who witnessed the collapse of New York’s twin towers on September 11, 2001 from recovering under this tort despite the obvious emotional distress occasioned by such an event. The Court of Appeals analysis is too restrictive.

The better formulation of the cause of action for negligent infliction of emotional distress is that announced by this Court in *Hunsley*, *Corrigal*, *Gain*, and *Hegel*:

- A family member may recover for negligent infliction of emotional distress if he or she observes an injured or dead relative at the scene of an accident or immediately thereafter and before there is a substantial change in the relative’s condition or location.
- The plaintiff need not actually witness the trauma to the loved one’s or that loved one’s suffering.
- This element of the tort is a question of fact for the jury.

Here, Colbert observed his dead daughter being pulled by her arms out of a lake and into a boat after she drowned and before there was any substantial change in her condition or the location of the accident. Jay Colbert met this requirement of the tort.

(b) Objective Symptoms of Emotional Distress

Washington cases on the tort of negligent infliction of emotional distress have also required the plaintiff to have “objective symptoms” of such distress. *Hunsley*, 87 Wn.2d at 436. In *Hegel*, this Court refined the “objective symptoms” element, rejecting the contention that “objective symptomology requires some sort of physical manifestation of the emotional distress.” 136 Wn.2d at 133. Instead, a plaintiff’s condition must be susceptible to medical diagnosis and proved through medical evidence. *Id.* at 135; *Haubry v. Snow*, 106 Wn. App. 666, 31 P.3d 1186 (2001) (same). *See, e.g., Trinh v. Allstate Ins. Co.*, 109 Wn. App. 927, 37 P.3d 1259, *review denied*, 147 Wn.2d 1003 (2002) (headaches, sickness to stomach, weight loss, hair loss, skin problems, depression, insomnia, crying). *Compare, Bryant v. Country Life Ins. Co.*, 414 F.Supp.2d 981, 1004 (W.D. Wash. 2006) (tort not established where plaintiff’s evidence of emotional distress consisted of plaintiff’s counsel’s observation of her at deposition and her testimony regarding her reaction to an insurer’s letter denying coverage). Thus, to satisfy this element of the cause of action, a health care practitioner must diagnose the plaintiff’s emotional distress as arising from the injury to a family member or loved one. Jay Colbert meets this requirement.

S. Erving Severtson, Ph.D., a licensed clinical psychologist, examined Colbert after Denise drowned. CP 472-74 (declaration); CP 485-500 (deposition testimony). During his examination of Colbert, Dr. Severtson administered the MMPI-2 test, a diagnostic tool. CP 488. Colbert's score on the test combined with Dr. Severtson's interview of Colbert provided a sufficient basis for Dr. Severtson to diagnose Colbert's clinical status. CP 473. Dr. Severtson diagnosed Colbert as suffering "extreme anxiety and depression manifested primarily in somatic signs and symptoms." CP 473. Colbert's anxiety and depression were also manifested in his dream images. CP 493. In his deposition, Dr. Severtson stated that, although he did not make a "DSM 4 diagnosis," he did conclude that there were "diagnostic descriptions" of Colbert. CP 488.

Dr. Severtson testified Colbert's presence at the scene helped to cause his severe anxiety and depression: "I think the anxiety is significantly more marked, and the consequences of that anxiety then are more marked, because he was there. I genuinely believe that." *See also* CP 499, 502.

The Court of Appeals' assertion (Op. at 16) that Dr. Severtson stated Colbert's psychological condition would be the same even if he had not seen Denise's dead body being pulled out of the lake is not supported by the record. Dr. Severtson testified, although Jay Colbert would have

suffered anxiety and depression had he been at the lake and saw the rescue efforts but did not see them pull Denise's body out the lake, Colbert's actually seeing Denise's dead body pulled by her arms out of the water and into the boat increased the severity of his emotional disorder. CP 496. He also testified the images from the night of the drowning, including images of rescue workers recovering Denise's body from the water, "very definitely" contributed to Colbert's emotional disorder. CP 498-99; *see also* CP 500 ("[T]he anxiety in particular is significantly greater because he was there.").¹³

This Court should reaffirm the *Hunsley/Hegel* rule on proof the emotional distress element of the tort: the plaintiff must experience emotional distress and such distress must be proved by the testimony of health care professionals diagnosing such distress based on appropriate evidence for such an expert opinion.

E. CONCLUSION

Skier's Choice was responsible for a powerboat that created the risk of carbon monoxide poisoning for swimmers like Denise Colbert.

¹³ Dr. Severtson testified in his declaration:

On the basis of reasonable psychological probability, I find that these conditions [somatic signs and symptoms evidence from conscious and dream images] were caused directly and/or marked exacerbated *by the death of his daughter and the traumatic witnessing of the search and recovery efforts* which resulted in the locating of her dead body.

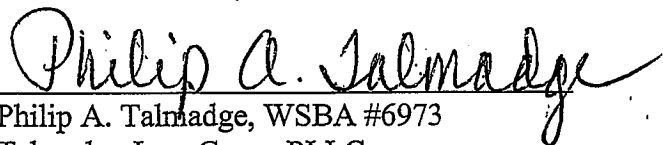
CP 473 (emphasis added).

Denise died of carbon monoxide poisoning. Jay Colbert was physically present at Lake Tapps where his only daughter drowned, arriving immediately after she was reported missing. He witnessed hours of search and rescue efforts; he viewed the removal of his daughter's body from the water. He was diagnosed as suffering from clinical depression from observing these events. Jay Colbert satisfied the requirements of physical presence, temporal proximity, and objective symptoms of emotional distress for the cause of action for negligent infliction of emotional distress under *Hunsley*, *Corrigal*, *Gain*, and *Hegel*.

This Court should reverse the trial court's summary judgment and remand the case to the trial court on the issue of negligent infliction of emotional distress. Costs on appeal should be awarded to Jay Colbert.

DATED this 3d day of April, 2007.

Respectfully submitted,



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APPENDIX

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STATE OF WASHINGTON

BY DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JAY COLBERT, as Personal Representative of
the Estate of Denise Colbert; and for himself,

Appellant,

v.

MOOMBA SPORTS, INC., a Tennessee
corporation, UNITED MARINE
CORPORATION OF TENNESSEE, a
Tennessee corporation, AMERICAN
MARINE CORPORATION, a Tennessee
corporation, SKIER'S CHOICE, INC., an
Oklahoma corporation and MARC JACOBI,

Respondents.

No. 33283-3-II

PUBLISHED OPINION

HUNT, J. — Jay Colbert appeals summary judgment dismissal of his action for negligent infliction of emotional distress (NIED) against Skier's Choice Inc. (SC). Colbert's daughter drowned swimming in a lake after inhaling carbon monoxide while hanging onto the rear of a moving motor boat manufactured by SC. Colbert argues that he suffered emotional distress after seeing rescuers in the distance pull his daughter's body from a lake two to three hours after she drowned. Holding that Colbert has failed to state an actionable claim for NIED, we affirm.

FACTS

I. DROWNING

Shortly after 2 A.M. one summer night, 21-year-old Denise Colbert (Denise)¹ and several friends took a motor boat out on Lake Tapps. Denise had been drinking. SC had manufactured the boat.

Denise, Matt Holt, Lindsay Lynam, and Kyle Swanson jumped off the boat and started to swim to shore. When they realized the shore was farther away than they had estimated, Marc Jacobi, the boat's owner and driver, moved the boat along side them and drove slowly toward shore while the swimmers held onto the boat's rear platform.

When the boat neared 200 yards off shore, Denise and Lynam again began swimming to the shore. Sometime between 3:00 and 3:30 A.M., Lynam noticed that Denise had disappeared beneath the water's surface. Lynam, Holt, and Swanson began searching for Denise, and Jacobi called 911. Swanson called Denise's father, Jay Colbert (Colbert), who was in bed at the time; he told him that Denise had fallen off the boat and they could not find her in the lake. Colbert stated that he took his other children to a neighbor's house and then drove to the lake, which was about a five-minute drive from his neighbor's house.

Police and other rescuers began arriving around 3:45 A.M. Colbert and his wife, Kelly Colbert (Denise's stepmother), arrived sometime thereafter. The scene was hectic with ambulances, police officers, and the fire department. Colbert told the rescuers he understood the seriousness of the situation but stated that he had faith in Denise's athletic ability. Colbert and

¹ We refer to Colbert's daughter by her first name for clarity; we intend no disrespect.

his wife drove to where rescuers were searching with boats, spotlights, and divers. They then left to go to a friend's nearby dock, from where they watched the rescuers search the lake.

Police Chaplain Arthur Sphar traveled back and forth between the rescue site and Colbert's dock vantage point to update him about the search. Later, when Colbert saw the rescue boat begin a search pattern out on the lake, he concluded that the rescuers were looking for Denise in a specific area. Colbert then saw a larger boat and more divers arrive at the scene.

Some time after 6:00 A.M., rescuers found Denise's body, and Sphar relayed this information to Colbert. About 10 minutes later, Colbert saw a buoy emerge from the water 100 yards (a football field) away, saw rescuers pull a body out of the water onto a boat,² and realized that Denise had drowned.

The rescuers quickly wrapped the body with a blanket, took the wrapped body to the property next to where Colbert stood watching, and placed the body in an ambulance. Colbert returned home.

The medical examiner reported the cause of Denise's death as drowning. The examiner also noted two other significant conditions, carbon monoxide and ethanol toxicity, which measured at 52 percent saturation and 0.12g/100 ml, respectively.

II. FATHER'S RESPONSE

Upon learning of Denise's death and seeing her body pulled from the lake Colbert was, of course, emotionally distressed. He later spoke with Dr. Alligra, some pastors, and friends about

² According to Sphar, they could see a body being pulled from the water, but it was not possible to see identifying detail from Colbert's vantage point on the dock.

his daughter's death. He did not see a psychologist or therapist, except once at his attorney's recommendation on October 22, 2004, when he saw psychologist Dr. Erving Severtson.

Over the course of four hours, Dr. Severtson interviewed Colbert, gathered information about Colbert's family and history, and administered the Minnesota Multiphasic Personality Inventory 2, a psychological assessment instrument. Dr. Severtson opined that Denise's death caused Colbert's anxiety and depression, which he classified as "reactive." Dr. Severtson believed that (1) Colbert's anxiety was significantly "more marked because he was" at the scene of Denise's drowning; but (2) Colbert's emotional distress would have been the same, regardless of whether Colbert had actually seen Denise's body being pulled onto the rescue boat.³

III. PROCEDURE

Representing his daughter's estate, Colbert filed an action against Moomba Sports Inc., United Marine Corp. of Tennessee, and American Marine Skier's Choice Corp. (collectively, "SC" for "Skier's Choice") for negligently failing to warn about carbon monoxide exposure and for negligently designing, manufacturing, developing, assembling, testing, inspecting, selling,

³ Dr. Severtson explained:

[T]o see the actual physical recovery, if he did, is adding one more image, so to speak. But you can turn your back and you have a perfect image of what's happening, and you know your daughter, and you know the circumstance and the situation.

The fact that he was there for that extended period of time made him a very susceptible person to the anxiety, the profound anxiety of the moment, or of the hour.

Seeing it makes it worse. But you are there for a three-hour period, the buoy pops up, and the only thing missing is your actual seeing of that body. To see it, you know, I think would make it worse, but I think you can turn your back and you see it, even though you didn't see it.

Clerk's Papers (CP) Vol. 3 at 496.

supplying, marketing, and promoting the boat on which Denise had been riding on the lake. Colbert claimed the defendants were strictly liable under RCW 7.72.030(2) and for breach of expressed and implied warranty. On October 4, 2004, he amended the complaint, adding his personal claim of negligent infliction of emotional distress (NIED) against SC.⁴

The trial court (1) denied Colbert's motion for summary judgment on behalf of Denise's estate; (2) granted SC's motion for partial summary judgment; and (3) dismissed Colbert's claims for breach of warranty, damages for Denise's pre-death suffering, and negligent infliction of emotional distress (NIED). The estate's product liability claim against SC remained.

The trial court then (1) denied Colbert's request to certify SC's partial summary judgment for appeal, and (2) granted Colbert's motion to dismiss the estate's claims without prejudice. Following voluntary dismissal of the other claims, the only claim remaining in Colbert's lawsuit was his personal NIED claim against SC, which the trial court had previously dismissed on summary judgment.

Colbert now appeals only the trial court's dismissal his NIED claim.

ANALYSIS

I. STANDARD OF REVIEW

Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. *Sheehan v. Cent. Puget Sound Transit Auth.*, 155 Wn.2d 790, 797-98, 123 P.3d 88 (2005). The court must consider all facts submitted

⁴ Colbert again amended the complaint on February 11, 2005, adding that SC alleged Jacobi was at fault. This amendment, however, has no bearing on the appeal before us.

and all reasonable inferences from them in the light most favorable to the nonmoving party.

Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

We perform the same inquiry as the trial court. The standard of review is de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

II. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Colbert argues that he is a "foreseeable" plaintiff, entitled to bring a claim for NIED against the boat manufacturer and distributors, SC, because he arrived shortly after the drowning accident, observed rescuers searching for his daughter, and saw her body being pulled from the lake two to three hours after she drowned. SC counters that Colbert does not qualify as a "foreseeable" NIED plaintiff because (1) he did not witness his daughter suffer or drown; (2) he had been watching fruitless search efforts for two to three hours before he learned that his daughter had drowned and then, ten minutes later, saw rescuers pull a body from the lake; and (3) his daughter had been dead for some time when he saw finally saw her body, from a distance, only momentarily.

The tort of NIED is a limited, judicially-created cause of action that allows bystander family members to obtain damages for "foreseeable" intangible injuries caused by viewing a physically-injured loved one shortly after a traumatic accident. *Hegel v. McMahon*, 136 Wn.2d 122, 125-26, 960 P.2d 424 (1998); *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 261, 787 P.2d 553 (1990).

The parties have raised issues that Washington courts have not yet addressed: (1) whether seeing an injured relative three hours after an accident constitutes "shortly thereafter" under *Gain* and *Hegel*; and (2) whether there can be a claim for NIED where the victim dies

before the family member arrives at the scene. The critical facts are not in dispute. Rather, the parties dispute (1) whether these undisputed facts are sufficient, as a matter of law, to establish a necessary legal element of a NIED cause of action, namely whether Colbert arrived at the accident scene "shortly after" his daughter's drowning; and (2) whether the trial court correctly answered that question "no" as a matter of law.

We agree with the trial court and hold that the following undisputed facts here do not, as a matter of law, meet the "shortly thereafter" requirement for establishing a bystander relative's cause of action for NIED: First, unlike the usual NIED case, where a family member either witnesses a loved one in an accident or comes upon the scene minutes later and observes the loved one's agonized state, Colbert was not at the scene either to witness Denise's drowning or soon enough thereafter to witness the final seconds of her disappearance under the lake's surface. Instead, he arrived at the accident scene at least 10 to 15 minutes after learning that his daughter has fallen off a boat and disappeared into the lake.

Second, not only was Denise not visible anywhere when Colbert arrived at the lake, but also he arrived only *after* many rescuers were already present and searching for his missing daughter. Third, before ever laying eyes on his daughter, or her body, Colbert primarily witnessed these rescue workers' futile attempts off shore for several hours. Fourth, by the time Colbert saw the rescuers stop the search, a chaplain had told him that his daughter was dead and that they were recovering her body.

Fifth, when the rescuers pulled her body from the lake onto the boat, she was a football field away, or about 100 yards, from Colbert's vantage point on the dock, her features were not visible, and the rescuers immediately covered her body in a blanket. Sixth, when the rescuers

brought her body to shore and loaded it onto an ambulance, she was still wrapped in the blanket, her face, not visible to Colbert. And finally, the rescue scene, which Colbert viewed from afar, was substantially changed in time and place from where Denise originally had drowned in the lake hours earlier.

Almost any of these undisputed facts alone would defeat Colbert's claim for NIED; taken together, they clearly do not meet the legal definition of arriving on the accident scene "shortly thereafter" as defined in any previous NIED case in Washington, not even by analogy. In short, the facts here do not as a matter of law create a cognizable cause of action for NIED. Thus, there is no legal or factual issue to send to trial by a jury.⁵ We hold, therefore, that the trial court did not err in granting summary judgment dismissal of Colbert's NIED action.

A. Elements

To sustain a NIED action, a plaintiff must first prove the four elements of negligence: duty, breach, cause, and damage.⁶ But not every negligent act that causes harm results in legal liability for emotional distress. *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976).

To limit the scope of liability in cases involving bystanders' emotional harm, Washington courts have incorporated requirements used to establish the tort of outrage: A defendant owes a

⁵ See, e.g. *Gain*. In *Gain*, it was undisputed that the plaintiff had not been present at the scene of the accident when or close in time to when the accident occurred. The appellate court determined that the plaintiff's presence at the accident scene was required as a matter of law to sustain a NIED claim. The appellate court, therefore, did not remand to the trial court for a jury to determine whether the plaintiff was at the scene of the accident. Similarly, the trial court here applied the undisputed facts to the law and found them lacking. There are no critical undisputed facts for a jury to resolve. See *Gain*, 114 Wn.2d 254.

⁶ These four elements replaced earlier requirements that the plaintiff be within the "zone of danger." *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001); *Hegel*, 136 Wn.2d at 126.

duty to only "foreseeable plaintiffs," and plaintiffs must experience emotional distress with objective symptoms. *Hegel*, 136 Wn.2d at 128; *Cunningham v. Lockard*, 48 Wn. App. 38, 44, 736 P.2d 305 (1987).

1. Duty to "foreseeable plaintiff"

Duty is a question of law that relies on mixed considerations of logic, common sense, justice, policy, and precedent. *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001); *Hunsley*, 87 Wn.2d at 434. A defendant has a duty to avoid inflicting emotional distress to "foreseeable plaintiffs." *Hegel*, 136 Wn.2d at 126. If a defendant negligently causes bodily injury to a person, a foreseeable plaintiff includes the injured person's family members who are physically present at the scene of an accident or who arrive "shortly thereafter." Otherwise, the plaintiff is "unforeseeable" as a matter of law.⁷ *Gain*, 114 Wn.2d at 261.

⁷ The term "unforeseeable" can be somewhat confusing in the NIED context. In many other types of tort actions, juries are generally charged with determining whether a person is a "foreseeable plaintiff" based on what the defendant knew or should have known under the circumstances and whether a reasonable person under those circumstances should have foreseen the harm. See, e.g., *Seeberger v. Burlington N. R.R.*, 138 Wn.2d 815, 823-24, 982 P.2d 1149 (1999); *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

But in the NIED context, foreseeability is usually determined by courts as a matter of law. Although the *Hunsley* court initially adopted a general rule that juries decide whether a plaintiff is foreseeable, *Hunsley*, 87 Wn.2d at 436-37, ten years later, we incorporated judicially-created limitations, recognizing the virtual unlimited liability that jury-determined foreseeability creates in the NIED context. *Cunningham*, 48 Wn. App. at 44-45. In place of the objective person standard of knowledge, notice, and reasonableness, we set forth specific requirements that a plaintiff must meet in order to be considered "foreseeable" and, thus, in the NIED context. *Cunningham*, 48 Wn. App. at 44-45. Our Supreme Court subsequently adopted, and further defined, most of these *Cunningham* requirements in *Hegel*, 136 Wn.2d at 130, 132, and *Gain*, 114 Wn.2d at 255. Thus, it is settled law in Washington that in the NIED context, foreseeability is not an open-ended question of fact for the jury; rather, it is a question of law for the court.

This concept is not a new in tort law. In premise liability actions, for instance, courts have set forth specific requirements that define the defendant's scope of liability instead of simply charging the jury with determining foreseeability based on notice, knowledge, and reasonableness. See, e.g., *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 204-05, 943 P.2d 286

Washington first recognized the tort of NIED in *Hunsley*. The defendant drove her car into the back-porch utility room of the plaintiff's home. When the plaintiff stepped into the living room, the floor collapsed. *Hunsley*, 87 Wn.2d at 425. The plaintiff suffered heart damage as a result of severe stress at the time of the accident. *Hunsley*, 87 Wn.2d at 426. The Court held that a plaintiff who suffers such mental distress has a cause of action, but this action is limited to foreseeable plaintiffs. *Hunsley*, 87 Wn.2d at 435-36.

In *Cunningham*, we further addressed the defendant's scope of liability for NIED. The defendant's car struck the plaintiffs' mother as she was walking across a road, causing extensive brain damage. The plaintiffs, the victim's minor children, did not see or hear the accident, and they did not learn about their mother's brain damage until later. *Cunningham*, 48 Wn. App. at 40-41. The children brought an action for NIED. *Cunningham*, 48 Wn. App. at 41. Borrowing limitations from the tort of outrage, we dismissed the plaintiffs' action, holding that NIED is "limited to plaintiffs who are actually *placed in peril* by the defendant's conduct and to *family members present at the time who fear for the one imperiled*." *Cunningham*, 48 Wn. App. at 45 (emphases added).

A few years later, in *Gain*, our Supreme Court approved and incorporated our *Cunningham* NIED rationale. A truck driver struck and killed a Washington State Patrol trooper.

(1997); *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994); *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

Of course, juries must still resolve certain necessary foundational facts that allow courts to determine whether duty exists. In the NIED context, for example, juries must still decide such facts as whether a plaintiff is relative, when the plaintiff arrived at the accident scene, what the plaintiff saw, and how the plaintiff was emotionally affected. Here, however, these foundational facts are essentially undisputed. Thus, based on these undisputed facts, the court determines the scope of liability as a matter of law based on the "foreseeability" and other NIED legal requirements set forth in *Cunningham*, *Gaines*, and *Hegel*.

That evening, the trooper's father and brother saw the fatal accident on the television evening news. They brought an action for NIED. *Gain*, 114 Wn.2d at 254-55. The Court held that in order to sustain their action, the plaintiffs had to have been "*physically present* at the scene of the accident or *arrive shortly thereafter*." Otherwise, the defendant had no duty to the plaintiffs because they were "unforeseeable as a matter of law." *Gain*, 114 Wn.2d at 261 (emphasis added).

Eight years later, the Supreme Court reiterated its adoption of the *Cunningham* rationale:

We agree with the Court in *Cunningham*, that unless a reasonable limit on the scope of defendants' liability is imposed, defendants would be subject to potentially unlimited liability to virtually anyone who suffers mental distress caused by the despair anyone suffers upon hearing of the death or injury of a loved one. As one court stated:

"It would surely be an unreasonable burden on all human activity if a defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it. . . ."

Gain, 114 Wn.2d at 260 (quoting *Budavari v. Barry*, 176 Cal. App. 3d 849, 855, 222 Cal. Rptr. 446 (1986) (quoting *Scherr v. Hilton Hotels Corp.*, 168 Cal. App. 3d 908, 214 Cal. Rptr. 393 (1985))).

Hegel, 136 Wn.2d at 127-28.

2. "Immediate aftermath" -- *Hegel*

Further addressing limits of NIED liability, in *Hegel*, our Supreme Court defined "shortly thereafter," the phrase it had used in *Gain*. In one of two consolidated cases, defendant McMahon struck a man, Hegel, who was pouring gasoline into his car parked along the side of a road, knocking him into a ditch. Hegel's family drove along the same road soon after the accident and discovered him lying in a ditch, severely injured, and bleeding from his nose, ears, and mouth. *Hegel*, 136 Wn.2d at 124. Hegel's family sued McMahon, alleging that the sight of

Hegel's injured body in the ditch put them in a state of fear and panic, from which they continued to suffer anxiety and shock. *Hegel*, 136 Wn.2d at 124-25.

In the other case, 19-year-old Marzolf was riding his motorcycle and collided with a school bus. His father came upon the scene within the next 10 minutes, before emergency crews arrived. Marzolf's father saw his son on the ground, unconscious, his leg cut off, and his body split almost in half; Marzolf died soon after his father arrived. Marzolf's father sued for NIED. *Hegel*, 136 Wn.2d at 125.

The Court rejected the proposition that in order to sustain an action for NIED, a family member must have actually been present when the accident occurred, expanding the time frame to include a time shortly after the accident but before a substantial change occurs:

[A] family member may recover for emotional distress caused by observing an injured relative at the scene of an accident *after its occurrence and before the there is substantial change in the relative's condition or location.*

Hegel, 136 Wn.2d at 132 (emphasis added).⁸ The Court recognized a need to "create a rule that acknowledges the shock of seeing a victim *shortly after an accident, without extending a defendant's liability to every relative who grieves for the victim.*" *Hegel*, 136 Wn.2d at 131 (emphasis added). Quoting *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986), the Court noted:

⁸ To prevent defendants from being subjected to potentially unlimited liability in NIED cases, some jurisdictions have developed more lenient requirements, while others have created far stricter ones. Compare *Beck v. Dep't of Transp. & Pub. Facilities*, 837 P.2d 105 (Alaska 1992) (seeing daughter after accident at hospital is actionable), and *Masaki v. Gen. Motors Corp.*, 780 P.2d 566 (Haw. 1989) (learning that son would never walk after accident at hospital is actionable), with *Fineran v. Pickett*, 465 N.W.2d 662 (Iowa 1991) (plaintiffs discovering victim two minutes after accident is not actionable), and *Cameron v. Pepin*, 610 A.2d 279 (Me. 1992) (defendant liable only if plaintiffs actually witness victim being injured). Washington adopted an intermediate approach in *Hegel*.

The essence of the tort is the shock caused by the perception of an especially horrendous event. . . . The kind of shock the tort requires is the result of *immediate aftermath* of an accident. It may be the crushed body, the bleeding, the cries of pain, and, in some cases, *the dying words which are really a continuation of the event*. The *immediate aftermath* may be more shocking than the actual impact.

Hegel, 136 Wn.2d at 130 (emphasis added). Thus, the Washington Court's adoption of the "shortly thereafter" standard appears to be based, in part at least, on Wyoming's "*immediate aftermath*" standard. This standard, in turn, echoes New Mexico's NIED requirement: "contemporaneous sensory perception" of the accident and observation of the injured person *before* emergency professionals arrive. *Gabaldon v. Jay-Bi Prop. Mgmt.*, 1996 NMSC-55, 122 N.M. 393, 396-97, 514, 925 P.2d 510 (1996).

In enunciating this rule, our Supreme Court explicitly rejected rigid adherence to a *specific* length of time that passes after an accident, focusing instead on the circumstances under which the plaintiff observes a seriously injured relative. *Hegel*, 136 Wn.2d at 131. Nonetheless, although rejecting a specific time frame, our Court has not departed from the basic requirement that the plaintiff's viewing the injured relative must be "shortly thereafter" in the sense of being roughly contemporaneous. *Hegel*, 136 Wn.2d at 132. Thus, whether a plaintiff has an actionable NIED claim depends on what the plaintiff witnessed "shortly after the accident" and the changes in the victim's condition or the scene after the accident.

3. No substantial change in accident aftermath

In *Gabaldon*, the New Mexico Supreme Court considered family-member bystanders' claims for NIED following the injury and near drowning of a boy in a wave pool at a water park. 925 P.2d at 510. His sister was not present at the time and learned about the accident from

others. When she went to the scene at least 10 minutes after the accident, she saw paramedics treating her brother. *Gabaldon*, 925 P.2d at 510-11. After having been summoned to the park, the boy's mother arrived at the scene and saw him being transferred into an ambulance, with a mask over his mouth and nose, his eyes rolled back, and his body motionless. Thinking he was dead, she became hysterical. *Gabaldon*, 925 P.2d at 511.

The New Mexico court established a bright line rule that family members must "contemporaneously perceive" the accident and observe the injured person *before* emergency professionals arrive in order to sustain an action for NIED. The court focused primarily on the emotional impact of the accident itself on the family members rather than on the impact from seeing emergency professionals attending to the victim. *Gabaldon*, 925 P.2d at 514.

Although Washington has not adopted New Mexico's bright line rule, *Gabaldon* illustrates our Supreme Court's purpose behind the rule it announced in *Hegel*: In order to sustain an action for NIED, the "bystander" family members must have arrived at the accident scene "shortly thereafter" but before there is a "substantial change in the victim's condition or location." *Hegel*, 136 Wn.2d at 132. Grafting the rationale from *Gabaldon* onto our Supreme Court's holding in *Hegel*, we hold that to sustain an action for NIED, (1) a plaintiff need not witness a defendant's negligent actions actually harming the victim; but (2) a plaintiff must arrive (a) soon enough to observe the accident's immediate aftermath and the accident's effect on the victim, and (b) before third-parties, such as rescuers and paramedics, have substantially altered the accident scene or the victim's location or condition. Colbert cannot meet this test here.

The *Gabaldon* plaintiffs did not meet the "contemporaneous sensory perception" or "shortly thereafter" standard when the victim's mother saw him whisked away in an ambulance minutes after the accident and rescuers' attempts to revive him. Clearly, therefore, Colbert, whose contact with his daughter's drowning was far more attenuated, cannot meet the standard either: Colbert's viewing of his daughter's body was farther away, masked by both distance and a blanket covering her; it occurred two to three hours after she drowned and at least 10 minutes after the chaplain told him that she was dead; and Colbert saw her only after significant changes in her location from the invisible spot in the lake where she had drowned earlier, unwitnessed by Colbert.

4. Emotional distress with objective symptoms

To establish a claim for NIED, not only must the plaintiff see the injured victim, but also this observation must cause emotional distress greater than the distress characteristic of learning about the tragic death or injury of a loved one. *Hegel*, 136 Wn.2d at 131, 135.⁹ Colbert cannot meet this standard here.

Even taking the evidence in the light most favorable to him on summary judgment, and even taking into account his understandable shock and terrible grief, Colbert does not show that his emotional distress here was caused by seeing his daughter's body, greater than what he would

⁹ "Not every act that causes harm results in legal liability." *Hunsley*, 87 Wn.2d at 434. The challenge is to create a rule that acknowledges the shock of seeing a victim shortly after an accident, without extending a defendant's liability to every relative who grieves for the victim. . . . An appropriate rule should not be based on temporal limitations, but should differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured. *Hegel*, 136 Wn.2d at 131.

have suffered from learning of his daughter's death or seeing her body wrapped in a blanket taken away in the ambulance by emergency personnel.

The shock of seeing efforts to save the life of an injured spouse in an ambulance or hospital, for example, will not be compensated because it is a life experience that all may expect to endure. The compensable serious emotional distress of a bystander under the tort of negligent infliction of emotional distress is not measured by the acute emotional distress of the loss of the family member. Rather the damages arise from the bystander's observance of the circumstances of the death or serious injury, either when the injury occurs or soon after.

Gabaldon, 925 P.2d at 514.

Colbert's physician, Dr. Severtson, stated that (1) "[Colbert's being] there for that extended period of time made him a very susceptible person to the anxiety, the profound anxiety of the moment, or of the hour";¹⁰ (2) simply being at the scene of the accident triggered Colbert's emotional distress; (3) Colbert would have suffered the same emotional distress, regardless of whether he had seen his daughter's body; and (4) even if Colbert had not seen his daughter's body, he would have created a mental image of the body.

Courts and commentators universally agree that the tort of bystander NIED is not available to compensate the grief and despair to loved ones that invariably attend nearly every accidental death or serious injury.

Gabaldon, 925 P.2d at 513 (citations omitted). Thus, even if Colbert's action had survived summary judgment on the other elements of NIED, it would not have survived on the distress-causation element.

¹⁰ Clerk's Papers Vol. 3 at 496.

B. Colbert's NIED Action

Applying this rule here, Colbert fails to meet the necessary requirements to sustain his NIED action. He drove to the accident scene after Swanson informed him that Denise had fallen off the boat. When Colbert arrived, rescuers were already in the water searching for his daughter. Colbert continued watching for three hours, realizing at one point that the rescuers had identified an area on the lake where his daughter was likely located. Colbert later saw a buoy emerge from the water, heard that the rescuers had discovered his daughter's body, and then watched as rescuers pulled the body out of the water 100 yards away,¹¹ which according to Sphar was too far away to make out identifying facial and body details.

Colbert unquestionably experienced a horrible tragedy, but he did not make the type of observations under circumstances described in *Hegel* as necessary to sustain a bystander relative's action for NIED. First, although Colbert arrived at the scene of the accident shortly after (around 10 minutes) it occurred, he did not see or hear his daughter drown. Nor did he see her upon his arrival. Instead, for two to three hours he witnessed rescue efforts by others in or diving from boats on the lake's surface some distance away.

Second, Colbert learned of his daughter's death about ten minutes before the rescuers pulled her body from the lake. The chaplain had come over to the dock where Colbert had been watching to tell him the sad news.

¹¹ Colbert indicated that he saw his daughter's body from 100 yards away, which is roughly the size of a football field. According to Sphar, this distance was too great to see any facial or other identifying body details. Most bystander NIED cases involve plaintiffs who have seen family members in relatively close proximity such that, in *Hegel*, for example, the plaintiff suffered emotional distress from the shock of witnessing such excruciating details as the crushed body, bleeding, and obvious agony of the injured loved one.

Third, when Colbert finally saw the body, he saw it only from a distance,¹² after rescuers had pulled it from its hidden location at the bottom of the lake. Then he watched rescuers remove the body from the lake, place it onto a boat, immediately wrap the body in a blanket, bring it back to shore, and then take the wrapped body away in an ambulance. Colbert did not see his daughter's body up close after the accident, as is usual for NIED claims. And when he did see her body, it was only briefly, from a distance, after rescuers had substantially changed her location, removed her body from the accident scene (the bottom of the lake), and wrapped the body in a blanket. Colbert did not witness the immediate aftermath of the drowning. And he never saw the accident scene or his daughter's body substantially unaltered by third-party involvement,¹³ which, again, distinguishes the facts here from other NIED cases.

Had the trial court allowed Colbert's NIED claim to go forward, such action would have been contrary to the *Hegel* rule that plaintiffs must arrive "shortly thereafter" an accident. As the Wisconsin and New Mexico Supreme Courts explain,

The tort of negligent infliction of emotional distress compensates plaintiffs whose natural shock and grief upon the death or severe physical injury of a spouse, parent, child, grandparent, grandchild, or sibling are compounded by the circumstances under which they learn of the serious injury or death. This tort reflects, for example, the intensity of emotional distress that can result from seeing the

¹² We do not attempt to establish a required physical proximity between the injured victim and the witnessing family member for purposes of NIED. Rather, we note simply that the distance must be close enough for the plaintiff to experience traumatic shock from a close-up view of the loved one's agonizing injuries and, under the undisputed facts here, that distance—100 yards—was clearly too great.

¹³ In *Hegel*, the Court mentioned a plaintiff's perceiving such sensory-dependent details as the crushed body, bleeding, and cries of pain, details not present here. Neither party here, however, argued whether seeing the victim's body, undamaged superficially, is sufficient to bring an action for emotional distress; thus, we do not address this issue.

incident causing the serious injury or death first hand or from coming upon the gruesome scene minutes later.

.... The distinction between on the one hand witnessing the incident or the gruesome aftermath of a serious accident minutes after it occurs and on the other hand the experience of learning of the family member's death through indirect means is an appropriate place to draw the line between recoverable and non-recoverable claims.

Gabaldon, 925 P.2d at 514 (quoting *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 444-45 (Wis. 1994)).

Lastly, Colbert did not "unwittingly" arrive at the accident scene, which other jurisdictions have required for a bystander family member to sustain a NIED claim. See, e.g., *Mazzagatti v. Everingham by Everingham*, 512 Pa. 533, 516 A.2d 672 (1986); *Nat'l County Mut. Fire Ins. Co. v. Howard*, 749 S.W.2d 618 (Tex. 1988). In *Hegel*, the plaintiffs happened upon the accident scenes immediately afterward and observed their seriously injured relatives, without prior warning or an opportunity to prepare. *Hegel*, 136 Wn.2d at 124-25. Colbert, on the hand, knew before he left home that his daughter had "fallen off" a boat in the lake and could not be located. And when he arrived at the lake, the accident scene was not readily apparent, and his daughter was not visible. Instead, Colbert watched third parties search for hours before seeing rescuers remove his daughter's body from the lake.

We agree with the trial court that Colbert failed to show that defendant SC owed him a duty of care. Therefore, we affirm the trial court's summary judgment dismissal of his action for negligent infliction of emotional distress against SC.¹⁴

¹⁴ Because this issue is dispositive, we do not address the remaining issues, such as whether a victim must be alive when a plaintiff arrives at the scene of the accident. Obviously, however, that Denise had been dead for hours did not preclude our consideration of Colbert's NIED claim.

33283-3-II

Affirmed.

Hunt J.
Hunt, J.

We concur:

Bridgewater, P.J.
Bridgewater, P.J.

Penoyar, J.
Penoyar, J.

DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and accurate copy of the following document: Supplemental Brief of Colbert in Cause No. 78833-2 to the following:

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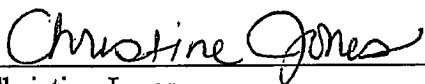
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Via email to:
Supreme Court
Olympia, Washington

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 3, 2007, at Tukwila, Washington.



Christine Jones
Talmadge Law Group PLLC

DECLARATION